IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting
(Chapter VIII, Rule 32(2) (b)
Description of Case
STR No. 2 of 2003
(Old No. 1558 of 1990)

Date of decision:- 12-7-2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 12-7-2006 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Sales Tax Revision No. 2 of 2003
(Old No. 1558 of 1990)

The Commissioner,
Sales Tax, U.P. Lucknow ...Revisionist

Versus

S/S I.D.P.L. Welfare Canteen, Veerbhadra,
Rishikesh .....respondent

Sri Pitamber Maulkhi, learned Additional Advocate General for the revisionist.
Sri V.K. Bisht, learned counsel for the respondent.

Hon'ble J.C.S. Rawat, J.

The Department has preferred this revision against the judgment and order dated 28th June, 1990 passed by the Sales Tax Tribunal by which the department had sought to quash the order of the Tribunal by which the Tribunal had exempted the assessee to pay the sales tax on the eatable prior to 03.02.1983.

Brief facts for the disposal of this revision are that the assessee was manufacturer of the medicine and he was running a canteen for its employees in the factory premises. The manufacturer was compelled to run this canteen u/s 46 of the Factory Act. It is also obligatory on the part of the assessee, if he would not run the said canteen, he would be prosecuted and convicted under the Factory Act. The assessee submitted its turn over of eatables, cigarette, milk and bardana etc. and the assessing officer assessed the tax on eatables, bardana and other raw material use in the preparation of these eatables. The assessee

preferred a first appeal u/s 9 of the Sales Tax Act and the first appellate authority reduced the tax on *dal* and *chawal* purchase an exempted the eatables and bardana from the purview of the sales tax. Feeling aggrieved by the said order, the department preferred appeal u/s 10 of the Sales Tax Act before the Sales Tax Tribunal. The Sales Tax Tribunal confirmed the judgment of the first appellate authority and the Tribunal was not agreeable to the findings of the first appellant Tribunal to exempt the entire eatables. The learned Tribunal noticed the amendment incorporated w.e.f. 03.02.1983 which clearly creates a difference in between the definition of the 'sale' as well as in the definition of the 'business'. While noticing this amendment, the Tribunal assessed the tax on the eatables w.e.f. 03.02.1983 and the rest of the amount of the turn over prior to 03.02.1983 were exempted in view of the definition of the sale and business as defined under the Act. Feeling aggrieved by the said order of the Tribunal, a revision has been preferred before this court.

The following substantial question of law as framed by this court:

> "*Whether, on facts and in the Circumstances of the case, the Sales tax Tribunal was legally justified to dismiss the appeal of Commissioner Sales Tax and confirm the order of the Assistant Commissioner (Judicial) by holding that the supply of foodstuffs by the assessee*

Canteen as 'service' when the dominant Object was 'sale' despite the fact that the judgment of the F.C.I. Gorakhpur V. C.S.T.U.P. (1980 U.P.T.C. pg.1) related to the period prior to insertion of Sub-clause (ii) in Section 2 (aa) of the U.P. Trade Tax Act?"

The point involved in this revision is only that the taxability of the eatables which were assessed by the assessing officer were correct or whether the assessee is liable to pay tax on the eatable prior to 03.02.1983. Shri Pitamber Maulkhi, learned Addl. Advocate General for the department contended that the learned Tribunal had erred in ignoring the fact that the U.P. Sales Tax Act is also applicable on the sales effected by the factory to its employees and the eatable which had been sold by the canteen are also liable to be taxed. Learned counsel for the assessee refuted the contention. The definition of 'business' has been provided u/s 2(aa) which is as under:-

"(aa) "business", in relation to business of buying or selling goods, includes-

(i) any trade, commerce or manufacturer, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern;

(ii) the execution of any works contract or the transfer of the right to use any goods for any purpose (whether or not for a specified period); and

(iii)any transaction of buying, selling or supplying plant, machinery, raw materials, processing materials, packing materials, empties, consumable stores, waste or by products or any other goods of a similar nature or any unserviceable or obsolete or discarded machinery or any parts or accessories thereof or any waste or scrap or any of them or any other transaction whatsoever which is ancillary to or is concerned with or is incidental to, or results from such trade, commerce, manufacture, adventure or concern or works contract or lease];

but does not include any activity in the nature or mere service of profession which does not involve the purchase or sale of goods;"

It clearly reveals that the definition of the business only includes the activities which are of the commerce nature. I have to examined whether running of the canteen was a business of the dealer company or its trun over would be liable to be taxed. The assessee had maintained this canteen under the compulsion provided under Section 46 of the Factory Act. In case, the assessee would not maintain the canteen as required under the factory Act, the penal consequences

would result. Section 2(h) which was amended in the Year 1985, w.e.f. 03.02.1983 also provided a clause (vi) by which the supply way of or part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink where supply or service is for cash or deferred payment or other valuable consideration would be included in the definition of the sale. 46th constitutional amendment 1985 came into force w.e.f. 03.02.1983. The definition provided by the constitutional amendment were included in the Sales Tax Act. Thus this definition clearly includes the services provided by the canteen for the eatables open for the tax under the provision of the Sales Tax Act. It is clear that a canteen which is incidental or ancillary to the trade or commerce would not be considered the business of the assessee prior to the amendment made under Section 2(h) (vi). The canteen run by the company would not constitute its independent business but it would be an incidental or ancillary activity under the statutory compulsion. In the assessment year in question the transaction which were incidental and ancillary to the business of buying and selling were not included in the definition of the ‘business’ & ‘sale’ under the U.P. Sales Tax Act. When the amendment came into force the definition of sale was amended and the services were also included within the definition of the sale. As such, the learned Tribunal was justified in holding after the enforcement of the aforesaid amendment w.e.f. 03.02.1983, the tax was liable to be

levied on eatables of the canteens. However, the assessee had not challenged before the court the order of the Tribunal by which the assessee had been held liable to pay the tax on eatable provided by the canteen. Thus the order of the Tribunal had become final to the extent. The revenue had challenged the first part of the order by which the Tribunal had exonerated the assessee from the tax liability on eatables prior to 03.02.1983. It is not disputed that the business of the assessee was the manufacturing of the medicine and not running of the canteen. The canteen was being run by the assessee in the discharge of its statutory obligation. Incidental and ancillary to this business. This being so, the turn over till the enforcement of the amendment could not be brought within the purview of the tax. Prior to the amendment of 1985, the position as has been laid down in **M/s The Fertilizer Corporation of India Ltd., Gorakhpur vs. Commissioner of Sales Tax, U.P., Lucknow** reported in **U.P. Tax Cases, 1980, volume I, (1980 U.P.T.C.-1)** is applicable and the assessee could not be levied sales tax on the eatable. The Tribunal was justified in holding that the turn over of the sales of eatable from the canteen was not liable to tax under the Act. Section 2 (h) (vi) provides as under:

> (vi) *the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not*

intoxicating) where such supply or service is for cash or deferred payment or other valuable consideration;

Supply of eatable from the canteen would essentially in the nature of service to its employees by the company and it could be identified as a sale u/s 2 (h) (vi).

In view of aforesaid discussion, there is no error of law committed by the learned Sales Tax Tribunal. The substantial question raised in this revision is answered accordingly. As such, the revision devoids of merit and is liable to be dismissed and the same is accordingly dismissed.

All applications pending in this case are stand disposed of in terms of the judgment.

(J.C.S.RAWAT,J.)

12TH July, 2006

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